6-8-2017

State v. Albertson Appellant's Brief Dckt. 44600

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**NO. 44600**
Plaintiff-Respondent,	)	
	)	**JEROME COUNTY NO. CR 2007-1231**
v.	)	
	)	
BRIAN A. ALBERTSON,	)	**APPELLANT'S BRIEF**
	)	
Defendant-Appellant.	)	
_____	)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

HONORABLE JOHN K. BUTLER
District Judge

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STATEMENT OF THE CASE

Nature of the Case

In 2007, Brian Albertson pled guilty to a single count of possession of a controlled substance and was granted a withheld judgment. Over the next three years, Mr. Albertson satisfied all of the conditions of his probation, including completing drug court. In 2010, he moved to withdraw his guilty plea and have his case dismissed. The State assented to Mr. Albertson's request, and the district court granted the motion and entered an order dismissing the case.

More recently, in 2016, Mr. Albertson filed a *pro se* motion pursuant to Idaho Court Administrative Rule 32 seeking to have his case sealed. He pointed out that since his case was dismissed he had remained law-abiding, become the father of three children, and obtained a master's degree, but felt he was disqualified from many jobs based on his having been previously convicted of a felony. At a hearing on Mr. Albertson's motion, the State had no objection, expressing that Mr. Albertson should get relief so long as it was in the court's power to grant such relief. Nevertheless, while the district court recognized it had the authority to seal Mr. Albertson's case, it declined to do so.

On appeal, Mr. Albertson contends the district court abused its discretion in denying his motion under Rule 32.

Statement of Facts and Course of Proceedings

In April 2007, Brian Albertson was charged with two counts of possession of methamphetamine (one count for methamphetamine found in the center console of his car and one count for methamphetamine found on his person) and misdemeanor counts of possession of

marijuana and possession of drug paraphernalia. (R., pp.27-29.) Mr. Albertson waived his preliminary hearing and was bound over to the district court. (R., pp.30-31, 33.)

Within three weeks of having been arrested, Mr. Albertson entered into a plea agreement, pursuant to which he pled guilty to a single count of possession of methamphetamine and, in exchange, the State dismissed the other counts and recommended probation. (*See* R., pp.38-40, 72.) At sentencing, the district court withheld judgment and placed Mr. Albertson on probation for three years, (R., pp.47-48, 49-70.) Apparently, as a condition of probation, Mr. Albertson was required to complete drug court. (*See* R., pp.75-76.)

At the conclusion of his three-year period of probation, Mr. Albertson filed a motion seeking to withdraw his previous guilty plea and have his case dismissed. (R., pp.75-76.) In support of that motion, he alleged that he had complied with all of the requirements and conditions of probation, including successful completion of drug court and paying all of his fines and fees. (R., pp.75-76.) At a hearing on that motion, the State indicated it had no objection to Mr. Albertson's guilty plea being withdrawn and his case dismissed. (R., pp.82-83.) Thereafter, the district court granted Mr. Albertson's motion. (R., pp.82-83.) A formal dismissal order was entered on October 22, 2010. (R., p.84.)

Nearly six years later, Mr. Albertson, acting *pro se*, filed a motion pursuant to Idaho Court Administrative Rule 32 seeking to have his case sealed. (R., pp.86-87.) In his written motion, Mr. Albertson averred that he had obtained a Master's Degree in Public Health Care Policy and he had not been convicted of any new crimes (felony or misdemeanor), and he explained that he was seeking a job in his new field, but was concerned that "the information contained in the Idaho repository may inhibit my ability to find a job in my field." (R., p.86.) At

a subsequent hearing on his motion,[1] Mr. Albertson revealed that, in addition to having furthered his education, he had had three children. (Tr., p.5, Ls.15-16.) He also elaborated on his argument concerning his difficulty finding work, explaining as follows:

> I'm getting to the point where I'm applying for positions, and it gets to the point where I'm—"Have you been convicted of a felony?" If I put yes, even though you're not automatically disqualified, it's automatically disqualifying. If I put no and they pulled my records, it shows that I was convicted of a felony[2] ….

(Tr., p.5, Ls.18-24.)

The district court denied Mr. Albertson's motion. (Tr., p.6, L.19 – p.9, L.8; R., p.91.) It lamented the fact that Idaho lacks a true expungement mechanism; it indicated that "if there was anyone who ever appeared before me who deserved [expungement], it would be you"; and it even apologized to Mr. Albertson for denying his motion. (Tr., p.8, L.22 – p.9, L.8.) But it ultimately concluded that Mr. Albertson failed to meet his burden, under Rule 32(i)(3),[3] to show that the harm to his economic or financial interests attendant to his case being available to the

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[1] At the hearing, Mr. Albertson was represented by counsel, but still addressed the court directly. (*See generally* Tr.)

[2] Pursuant to *United States v. Sharp*, 145 Idaho 403 (2008), entry of a guilty plea is a "conviction" under Idaho law. Thus, depending on how a job application question is worded, in order to answer truthfully Mr. Albertson may have to disclose his past "conviction" in this case even though his guilty plea was withdrawn and the case was dismissed. For example, if a job application asked, "Have you *previously* been convicted of a felony," the truthful response would probably be "yes."

Adding to Mr. Albertson's challenges, it appears that even though his case was ordered dismissed in 2010, for years thereafter, the Idaho Repository failed to reflect that dismissal and still indicated that he had a withheld judgment. (*See* Tr., p.9, L.9 – p.10, L.17.) Thus, even if Mr. Albertson indicated on a job application that he did not have a *current* felony conviction, his disclosure would have appeared to a potential employer to be false.

[3] Rule 32 was amended multiple times in 2016. It appears that the district court was working off the version of the Rule that existed prior to July 1, 2016. Although the relevant portions of the Rule are substantively unchanged, since July 1, 2016, the relevant language has been codified at I.C.A.R. 32(i)(2)(C).

Under Rule 32(i)(2)(C), a court has the discretion to seal or redact court records where they "contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to a person having an interest in the documents or materials …."

public, outweighed the public's interest in knowing about his case. (Tr., p.6, L.19 – p.7, L.23, p.8, Ls.8-16, p.9, Ls.3-8.) Critical to this conclusion was the court's observation that Mr. Albertson did not offer any evidence that he "has been denied employment based upon the information in the repository," and, instead, merely "speculates that that could happen." (Tr., p.8, Ls.8-16.)

Following entry of a written order denying Mr. Albertson's motion (*see* R., p.91), Mr. Albertson filed a timely notice of appeal (R., pp.93-95). On appeal, Mr. Albertson contends the district court abused its discretion in denying his motion. Specifically, he contends that because the relevant court rule only required a showing that his financial security "*may*" be compromised, or that he "*could*" suffer economic or financial loss or harm, I.C.A.R. 32(i)(2)(C) (emphasis added), he was not required to show that he had actually already been denied a job based on information concerning his case being available to the public.

ISSUE

Did the district court abuse its discretion in denying Mr. Albertson's motion to seal his criminal case?

ARGUMENT

The District Court Abused Its Discretion In Denying Mr. Albertson's Motion to Seal His Criminal Case

A. Introduction

The district court abused its discretion in denying Mr. Albertson's motion—made pursuant to Idaho Court Administrative Rule 32(i)(2(C)—to seal the record. Specifically, the district court abused its discretion by failing to act consistently with the applicable legal standard.

B. Applicable Legal Standards

In *State v. Turpen*, the Idaho Supreme Court observed that a defendant's request to have his case "expunged" is properly made pursuant to Idaho Court Administrative Rule 32(i). 147 Idaho 869, 871 (2009).[4] This Rule provides, in relevant part, as follows:

> **(i) Other Prohibitions or Limitations on Disclosure and Motions Regarding the Sealing of Records.** Physical and electronic records, may be disclosed, or temporarily or permanently sealed or redacted by order of the court on a case-by-case basis.
>
> (1) Any person or the court on its own motion may move to disclose, redact, seal or unseal a part or all of the records in any judicial proceeding. The court shall hold a hearing on the motion …. The court may order that the record immediately be redacted or sealed pending the hearing if the court finds that doing so may be necessary to prevent harm to any person or persons. In ruling on whether specific records should be disclosed, redacted or sealed by order of the court, the court shall determine and make a finding of fact as to whether the interest in privacy or public disclosure predominates. If the court redacts or seals records to protect predominating privacy interests, it must fashion the least restrictive exception from disclosure consistent with privacy interests.

[4] The *Turpen* Court did not use the term "expungement" literally, in the sense that court records could be *destroyed* at the request of the defendant; rather, the Court used it to "mean the issuance of a court order requiring physical or electronic sequestration of such record from public access or inspection." *Turpen*, 147 Idaho at 870-71. Further, the Court of Appeals has subsequently explained that relief under Rule 32(i) does not render the sealed proceedings a nullity (as if they had never occurred), only that the records of those proceedings are protected from disclosure. *See State v. Doe*, 155 Idaho 99, 106 (Ct. App. 2013).

(2) Before a court may enter an order redacting or sealing records, it must also make one or more of the following determinations in writing:

> (A) That the documents or materials contain highly intimate facts or statements, the publication of which would be highly objectionable to a reasonable person, or
>
> (B) That the documents or materials contain facts or statements that the court finds might be libelous, or
>
> (C) That the documents or materials contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to, a person having an interest in the documents or materials, or compromise the security of personnel, records or public property of or used by the judicial department, or
>
> (D) That the documents or materials contain facts or statements that might threaten or endanger the life or safety of individuals, or
>
> (E) That it is necessary to temporarily seal or redact the documents or materials to preserve the right to a fair trial, or
>
> (F) That the documents contain personal data identifiers that should have been redacted pursuant to Rule 2.6 of the Idaho Rules of Civil Procedure, in which case the court shall order that the documents be redacted in a manner consistent with the provisions of that rule.

(3) In applying these rules, the court is referred to the traditional legal concepts in the law of the right to a fair trial, invasion of privacy, defamation, and invasion of proprietary business records as well as common sense respect for shielding highly intimate or financially sensitive material about persons.

(4) When a record is sealed under this rule, it shall not be subject to examination, inspection or copying by the public. When the court issues an order sealing or redacting records, the court shall also inform the Clerk of the District Court of which specific files, documents and case management system records are to be sealed or redacted. When the court issues an order sealing or redacting records for purposes of public disclosure, the original records in the court file shall not be altered in any fashion.

I.C.A.R. 32(i). Thus, under this Rule, in order for there to be an order to redacting or sealing the record (or a portion thereof), the trial court must: (1) find that the information to be redacted or

sealed implicates at least one of the six privacy concerns enumerated in Rule 32(i)(2)(A) – (F)[5]; and (2) balancing the movant's privacy interest against the public's interest in disclosure, the movant's interest in privacy predominates.[6] And, if such an order is entered, the court "must fashion the least restrictive exception from disclosure consistent with privacy interests." I.C.A.R. 32(i)(1).

A decision of a district court not to redact or seal the record under Rule 32(i) is reviewed for an abuse of discretion. *State v. Gurney*, 152 Idaho 502, 503 (2012). An abuse of discretion will be found if: (1) the district court failed to correctly perceive that it had discretion; (2) it failed to act within the boundaries of its discretion and consistently with applicable legal standards; or (3) it failed exercise reason in reaching its decision. *Id.*

C. The District Court Abused Its Discretion In Denying Mr. Albertson's Motion To Seal His Criminal Case

Mr. Albertson contends the district court abused its discretion when it denied his Rule 32(i) motion to seal his criminal case. Specifically, the district court failed to act consistently with the applicable legal standard in denying his motion. In evaluating Mr. Albertson's personal privacy interest in light of Rule 32(i)(2)(C), it held Mr. Albertson to a standard of having to produce evidence of *actual* financial loss or economic harm, *i.e.*, an actual lost employment opportunity, owing to the record in his case being available to the public. However, under this Rule he was only required to show that the information contained in the record, and left open to the public, "*may* compromise [his] financial security" or it "*could reasonably* result in economic or financial loss or harm." I.C.A.R. 32(i)(2)(C) (emphasis added).

[5] I.C.A.R. 32(i)(2). In this case, the only privacy concern of Rule 32(i)(2) that is at issue is that which is set forth in Rule 32(i)(2)(C), *i.e.*, that the dissemination of the information in the record "may compromise the financial security of, or could reasonably result in economic or financial loss or harm to," Mr. Albertson.

In support of his Rule 32(i) motion, Mr. Albertson alleged, *inter alia*, that he had recently obtained a Master's Degree in Public Health Care Policy and was seeking a job in his new field, but was concerned that "the information contained in the Idaho repository may inhibit my ability to find a job in my field." (R., p.86.) He went on to explain as follows:

> I'm getting to the point where I'm applying for positions, and it gets to the point where I'm—"Have you been convicted of a felony?" If I put yes, even though you're not automatically disqualified, it's automatically disqualifying. If I put no and they pulled my records, it shows that I was convicted of a felony ….

(Tr., p.5, Ls.18-24.)

As the district court correctly recognized (*see* Tr., p.7, Ls.5-23), Mr. Albertson's motion invoked the basis for sealing records that is set forth in Rule 32(i)(2)(C)—where the record "contain facts or statements, the dissemination or publication of which may compromise the financial security of, or could reasonably result in economic or financial loss or harm to, a person having an interest in the documents or materials …." It is now well-established that a loss of employment opportunities, as Mr. Albertson alleged here, may qualify someone for relief under Rule 32(i)(2)(C). In *Doe v. State*, the State had argued that a loss of employment opportunities attendant to a criminal conviction cannot satisfy the "financial security" or "economic or financial loss or harm" standard of Rule 32(i)(2)(C), but the Idaho Court of Appeals rejected the State's contention. 153 Idaho 685, 689-90 (Ct. App. 2012).

The district court seems to have recognized that a loss of employment opportunities could form a basis for relief under Rule 32(i)(2)(C); however, in evaluating whether Mr. Albertson met his burden under that subsection of Rule 32, the district court apparently concluded that he failed to satisfy the standard: "I don't have any evidence before me at this time that Mr. Albertson has been denied employment based on the information in the repository. The motion speculates that

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[6] I.C.A.R. 32(i)(1); *State v. Gurney*, 152 Idaho 502, 504-05 (2012).

could happen." (Tr., p.8, Ls.8-12.) Thus, the district court appears to have reasoned, in part, that because Mr. Albertson failed to prove he was *actually* denied employment, he failed to make an adequate showing under Rule 32(i)(2)(C). However, under that Rule, he was not required to show he had *actually* suffered economic harm owing to his criminal case being open to the public. He was only required to show that such economic harm was *possible*. As quoted above, Rule 32(i)(2)(C) calls for an inquiry into whether public dissemination of the information at issue "*may* compromise [the movant's] financial security" or whether it "*could reasonably* result in economic or financial loss or harm" to the movant. I.C.A.R. 32(i)(2)(C) (emphasis added).

By holding Mr. Albertson to a standard of showing actual financial or economic harm, as opposed to the mere possibility of such harm, the district court applied a more stringent standard than that called for under Rule 32(i)(2)(C). Thus, the district court failed to act consistently with the applicable legal standard and, therefore, abused its discretion.

Further, this abuse of discretion tainted the district court's ultimate decision to deny Mr. Albertson's motion. Having applied an erroneous standard to its evaluation of Mr. Albertson's personal interest in the privacy of his criminal record, the district court was in no position to take the next step in its analysis and balance Mr. Albertson's privacy interest against the State's interest in disclosure.

CONCLUSION

For the foregoing reasons, Mr. Albertson respectfully requests that the order denying the motion to seal his case be vacated, and that his case be remanded to the district court for consideration of his motion under the proper standard.

DATED this 8th day of June, 2017.

_____/s/_____
ERIK R. LEHTINEN
Chief, Appellate Unit

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of June, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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